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BEFORE THE

IDAHO PUBLIC UTILITIES COMMISSION

Grand View PV Solar Two, LLC, Complainant, vs. IDAHO POWER COMPANY, Defendant.	Case No. IPC-E-11-15 PETITION FOR RECONSIDERATION

COMES NOW Grand View PV Solar Two, LLC ("Grand View") and pursuant to Rule 331 of the Idaho Public Utilities Commission's ("Commission") Rules of Procedure and hereby respectfully lodges its Petition for Reconsideration of Order No. 32913. Rule 331 provides, in part, that "any person interested in a final order or any issue decided in a final order of the Commission may petition for reconsideration." In addition, Rule 331 requires a petition for reconsideration to specify why the order at issue "is unreasonable, unlawful, erroneous or not in conformity with the law." For the reasons set forth below, Grand View respectfully submits that Order No. 32913, the final order in this docket is unreasonable, unlawful, erroneous and not in conformity with the law.

I.
THE COMMISSION CONTINUES TO ADHERE TO THE FICTION THAT A LEGALLY ENFORCEABLE OBLIGATION AND A CONTRACT ARE ONE AND THE SAME

They are not the same thing, and this Commission has clearly conflated the two distinct concepts. At page 26 of Order No. 32913 the Commission made the following ultimate finding:

> We conclude that Grand View's insistence that Idaho Power disclaim REC ownership left the QF unwilling to enter into a binding and unconditional PURPA contract with Idaho Power. Therefore, we conclude that Grand View did not create a legally enforceable obligation in this case.

The Commission's finding that Grand View did not create a legally enforceable obligation rests on its conclusion that the QF was "unwilling to enter into a binding…contract." Making a LEO contingent upon the QF's willingness to enter into a "binding and unconditional contract" essentially repeals the must buy provisions of PURPA, which this Commission is not empowered to do. QFs can create a legally enforceable obligation without a fully executed and approved agreement. *See* 18 C.F.R. § 292.304(d)(2); *Cedar Creek Wind LLC*, 137 FERC ¶ 61,006 (2011). The Commission has determined that QFs can create a legally enforceable obligation without obtaining a fully executed agreement. *See In Re Cedar Creek Wind*, IPUC Order No. 32419 at 8-9, Case Nos. PAC-E-11-01, -02, -03, -04, -05 (2011).

Although Idaho Power, and apparently this Commission as well, resists the concept that a QF may unilaterally obligate a utility to purchase its capacity and energy without entering into a "binding and unconditional contract," to be repugnant, *that is the law*. Cleary, the REC dispute was a distraction unresolved as of the time Grand View initiated this docket via a complaint in August 2011. But resolution of REC ownership was not a condition barring Grand View from creating a legally enforceable obligation. FERC's ruling on this topic is instructive, and controlling:

> [T]he phrase legally enforceable obligation is broader than simply a contract between an electric utility and a QF and that the phrase is used to prevent an electric utility from avoiding its PURPA obligations by refusing to sign a contract, or as here from delaying the signing of a contract, so that a later and lower avoided cost is applicable. We further find that Idaho PUC's June 8 Order ignores the fact that a legally enforceable obligation may be incurred before the formal memorialization of a contract to writing.[1]

FERC further observed that:

> Courts have recognized that negotiations regarding terms that parties to the negotiations intend to become a finalized or written contract, may in some circumstances result in legally enforceable obligations on those parties notwithstanding the absence of a writing.[2]

Because Idaho Power insisted on a term that it knew was objectionable to the QF, one *that was not required by then existing law*, Grand View did not execute the contract. However, it did create a legally enforceable obligation.

II.
THE COMMISSION CONTINUES TO IMPERMISSIBLY TIE CREATION OF A LEO TO RESOLUTION OF REC OWNERSHIP

This Commission has specifically ruled on several occasions that the issue of REC ownership was to be voluntarily decided between the QF and the utility. Indeed, the Commission reiterated those findings in this very docket. Were it not for Idaho Power's insistence on the REC language, Grand View and Idaho Power would have executed a PPA back in the summer of 2011. The Commission's ruling on the ownership of RECs in this very docket further supports this conclusion. In order No. 32580, issued in this docket, the Commission observed:

> What is clear in our review of these two Orders is the Commission did not squarely decide the ownership of RECs, nor did we implicitly indicate that RECs are the sole property of QFs. As the finder of fact, we do not infer from these Orders that Idaho Power has permanently waived its rights to RECs, or that a utility does not have a right to

[1] *Cedar Creek Wind, LLC,* 137 FERC ¶ 61,006 , at P 15 (2011).
[2] *Id.* at FN 62.

> RECs, or that this Commission has determined that REC ownership vests entirely with QFs.
>
> As the Commission has consistently observed, Idaho has no renewable portfolio standard, nor does it have a REC program.
>
> What this Commission has said is that **QFs and utilities may voluntarily negotiate RECs.**[3]

It is utterly impossible to reconcile the Commission's declaration that QFs and utilities may voluntarily negotiate RECs, with its conclusion in its final order that Grand View's failure to negotiate RECs with Idaho Power was fatal to its creation of a LEO. The Commission's confusion as to the distinction between a LEO and REC ownership is highlighted by its finding that "we conclude that REC ownership and LEO issues are not two separate and distinct issues." However, if REC issues are subject to voluntary negotiations, then they must be separate and distinct. Making Grand View's LEO contingent on its negotiation of RECs belies the Commission's own findings. Essentially the Commission said the parties are free to agree – or not – but the Commission has not made a determination on REC ownership. Under that scenario Idaho Power had every incentive to play hardball and insist upon terms it knew to be objectionable to Grand View and to which Grand View had no legal obligation to capitulate.

This Commission arbitrarily dismissed Grand View's discussion of the importance of Order No. 29480 in Docket No. IPC-E-04-2. In that docket, Idaho Power asked the Commission to issue "a Declaratory Order regarding the ownership of the marketable 'environmental attributes' … associated with PURPA … projects." Idaho Power also asked the Commission declare "that ownership of green tags be confirmed in the QF and as a condition of contract that

[3] Order No. 32580 at p. 12. Emphasis provided.

the utility be granted a 'right-of-first-refusal' to purchase the tags."[4] In response, in Order No. 29480, the Commission declared:

> While this Commission will not permit the Company in its contracting practices to condition QF contracts on inclusion of such a right-of-first-refusal term, neither do we preclude the parties from **voluntarily negotiating** the sale and purchase of such a green tag…"[5]

Yet, the Commission's final order in this case claims just the opposite. At page 25 the Commission states, "Grand View asserts that the Commission's prior Order [29480] expressly declared that Idaho utilities may not condition their mandatory obligation to purchase on a right of first refusal." Then at pages 25 - 26 the Commission concluded that, "Thus, we found and we again affirm that Order No. 29840 does not stand for the proposition cited by Grand View." It is impossible to read the above quoted passage from Order No. 29840 and not conclude as Grand View did: "this Commission will not permit the Company in its *negotiating practices* to condition QF contracts on inclusion of such a right-of-first-refusal."

As contemplated by Order 29480, Grand View **voluntarily** negotiated the issue of REC ownership with Idaho Power. The negotiations were lively and resulted in Grand View's voluntary decision not to sell (or gift) its RECs to Idaho Power. Idaho Power, in violation of Order No. 29840, chose to make its contracting practices subject not merely to Grand View's granting it a right of first refusal to purchase, but subject to Grand View's *outright gifting of half of its RECs to the power company*. The Commission's final order is thus arbitrary in its finding that Order No. 29840 does not, in fact, stand for the very proposition for which Grand View cited it.

The Commission's final order observes that:

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[4] Order No. 29480 at p. 16.
[5] Order No. 29480 at p. 16. Emphasis provided.

> Grand View's initial complaint and amended complaint do not mention the term "legally enforceable obligation" and its Motion for Summary Judgment only mentions LEO in passing.[6]

However, the second sentence of Grand View's Motion for Summary Judgment declares:

> Grand View has requested a standard Public Utility Regulatory Policies Act of 1978 ("PURPA") power purchase agreement ("PPA") with Idaho Power Company containing Integrated Resource Plan Methodology ("IRP Methodology") rates valuing only the energy and capacity to be sold from Grand View's solar power generating facility.[7]

This was not a reference "in passing" that Grand View was entitled to a PURPA agreement, a.k.a. LEO. The LEO issue was the very heart of its complaint. It remains so.

In the opening complaint filed by Grand View in August of 2011, Grand View makes it abundantly clear that it had created a LEO and that Idaho Power's illegal insistence on REC language reopener was bad faith negotiating and illegal under PURPA. A review of some of Grand View's Claims for Relief may focus the Commission on the nature of this case.

> 5. Grand View PV Solar Two, LLC, has been actively engaged in the development of a solar electric generating project near to Grand View, Idaho that is designed to generate 20 MW of nameplate capacity.
>
> 6. Grand View PV Solar Two, LLC, has made substantial investments in development of the project. The project is mature and entitled to obligate itself to a long-term PPA for a PURPA QF pursuant to Idaho Power's IRP calculated avoided cost rates.
>
> 7. Grand View has been in contact with Idaho Power for several months discussing contract terms and conditions.
>
> 8. Grand View PV Solar Two is ready and willing to enter into the standard PURPA PPA with IRP calculated rates that disclaims REC ownership by Idaho Power.
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> 16. Grand View Solar Two has attempted in good faith to engage in negotiations to obtain the contract language that has historically been included in Idaho Power's PPAs to the effect that Idaho Power disclaims ownership of any of the RECs associated with its QF project.

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[6] Order No. 39213 at p. 16.
[7] Motion for Summary Judgment p. 1.

17. The regulations promulgated by FERC provide that qualifying facilities may elect to have the rate and the terms and conditions of purchase at which it sells electricity to a public utility based on the utility's predicted avoided costs at the time of delivery, but calculated at the time the obligation is incurred.

18. The rates and terms and conditions of the PPA are not subject to ongoing regulation and may not be subsequently amended.

19. Idaho Power's insistence on language in the PPA that it may be amended to account for subsequent changes in the law relating to REC ownership violates PURPA and its implementing regulations and is illegal and unreasonable.

20. By insisting on a contract 'reopener' the power company is attempting to make the QF contract subject to utility-type regulation which is prohibited by PURPA.[8]

The opening pleading in this docket unambiguously asserted Grand View's claim that it is entitled to a contract and that it had obligated itself to sell its output to Idaho Power as of August 2011. The Commission's subsequent orders have proven Grand View to be correct to the effect that; (1) no RECs existed at the time, (2) the parties were free to voluntarily negotiate REC ownership (and free not to do so) and (3) Grand View and Idaho Power had agreed to all other terms of the contract. Even so, the Commission has tied the "voluntary" negotiation of the REC language to the creation of a LEO, effectively sand bagging the project by applying to these facts a rule not then enacted -- changing the rules of the road after the fact. In August of 2011 a QF was free to not negotiate its RECs, however the Commission has retroactively reached back and requires the QF to negotiate REC ownership where no such requirement existed.

III.
THE COMMISSION FAILED TO ADDRESS GRAND VIEW'S RETROACTIVE RATEMAKING ARGUMENT

In its response to Order No. 32861, Grand View objected to the retroactive application of the Commission's REC ownership order in Generic Docket No. GNR-E-11-03. The Commission's final order only addresses the retroactive ratemaking argument by declining to

[8] Complaint at p. 5.

address it. In a passing footnote the Commission's final order states, "Because the scope of Order No. 32861 was limited to providing evidence regarding the issue of unconditional LEO, we decline to address Grand View's new retroactive argument about RECs."[9] In a perhaps less direct reference to Grand View's retroactive ratemaking argument the Commission also provided that:

> Second, in our prior Order No. 32861 in this case, we stated that the parties were on notice that REC ownership would be addressed in our parallel PURPA investigation. Both Grand View and Idaho Power were parties and participated in the GNR-E-11-03 case. … "Having decided the disputed issue of REC ownership in the PURPA investigation [case]," the Commission found it appropriate to consistently apply the REC ownership decision in this case.[10]

Not only was Grand View's complaint filed well before the Commission's generic avoided docket was even opened, the final order in that docket was issued almost two years after Grand View created its LEO with Idaho Power in the summer of 2011.

Retroactive ratemaking is a serious and substantive violation of Grand View's due process rights. Grand View urges this Commission to revisit and address this issue as it is indeed relevant to the question of whether Grand View created a legally enforceable obligation. The Commission's reasoning is circular. However if it is determined to equate the creation of a LEO with the existence of a signed contract, and if it is insisting on applying a later developed rule to parties' legal relationship then the issue is relevant. However, as discussed above, a LEO can exist independent of an executed contract.

The Commission's initial policy statement apportioning RECs equally between the utility and the QF in Order No. 32697 is, in fact, a policy statement written on a blank page. Prior to

[9] Order No. 32913 at p. 16
[10] *Id.* at p. 16. Bracketed material in original, citations omitted.

the Commission's issuance of Order No. 32697 there was nothing – either in statute, administrative rule, or other state policy – to clarify.[11]

The United State Supreme Court instructs:

> [T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.[12]

In implementing Federal law, agencies are prohibited from engaging in retroactive rulemaking unless that authority is expressly authorized by statute.[13] Here, PURPA makes no allowance for retroactive implementation and doing so violates fundamental due process protections.

To retroactively apply the Commission's initial policy statement (Order No. 32697) in its order on clarification (Order No. 32861) and in its final order (Order No. 32913) to the dispute between Grand View and Idaho Power violates both Article I, Section 10 of the United States Constitution and Article I, Section 16 of the Idaho Constitution because it impairs a valid legal obligation that existed prior to both the initial policy statement and the order on clarification.

Article I Section 16 of the Idaho Constitution provides:

> No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall ever be passed.[14]

Article I, Section 10 of the United States Constitution provides, in part:

> No state shall….pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts[15]

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[11] With the sole exception found in the Commission's standing order that Idaho Power could not condition a contract on Idaho Power's right of first refusal to purchase the QFs RECs.
[12] *Landgraf v. USI Film Products,* 511 U.S. 244, 265, 114 S. Ct. 1483 (1994)
[13] *See Bowen v. Georgetown University Hosp.* 488 U.S. 204, 208, 109 S. Ct. 469 (1988)
[14] Emphasis provided.
[15] Emphasis provided.

The above referenced sections from the United States' and Idaho's Constitutions prohibit the impairment of contractual obligations. Under PURPA however, a LEO created by a QF is no less binding on a utility than a standard commercial contract between the utility and a third party vendor or a ratepayer. Therefore, the same public policy underlying these constitutional protections should apply to protect a LEO from the impairment of its LEO with the utility.

When deciding challenges under Article I, Section 16 of the Idaho Constitution, "Idaho courts should apply federal analytical principles when deciding challenges under article I, § 16 of the Idaho Constitution because the state constitution is not more protective of contracts than the federal constitution."[16] The Idaho Supreme Court has long recognized the police power exception to the contracts clause in the context of regulating labor contracts and public utilities. The rationale is that public utilities affect "the public interest and the private rights of contracts in relation thereto are subjected to the valid exercise of the police power by the legislature."[17] As applied to public utilities, "The Court reiterated this exception in *Agricultural Products Corporation v. Utah Power & Light Company*, holding that the state's regulation of utility rates pursuant to its police power including statutory alteration of rate set by private contracts, was 'not a violation of the constitutional prohibition against impairment of contractual obligations.' 98 Idaho 23, 29, 557 P.2d 617 (1976)." [18]

In *CDA Dairy Queen*, however, the Idaho Supreme Court went on to explain that "Of course, the police power is not unlimited, and the state may not interfere with a utility contract unless it finds that the rate 'is so low as to adversely affect the public interest-as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory.'"[19]

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[16] *CDA Dairy Queen, Inc. and Discovery Centre, LLC of Salmon v. State Insurance Fund* Idaho Supreme Court Opinion No. 44, April 9, 2013, P 3.
[17] *Id.* at FN 1.
[18] *Id.* at P 7.
[19] *Id*

In the *Agricultural Products* case cited above, the Commission was engaged in its police power function in setting retail rates for a regulated utility. Here the Commission is not setting rates and is not engaged in its police power role in protecting the utility from rates so low as to be confiscatory.

The Federal framework for determining whether a legislative act violates the contracts clause is a three-step analysis: (1) Has the challenged legislative enactment operated as a substantial impairment of a contractual relationship? (2) If so, does the act serve "an important public purpose" (also referred to as a "significant and legitimate public purpose");[20] and (3) If so, is the act "reasonable and necessary to advance that purpose?"[21] Regarding the first step,

> If a court determines that a legislative act has impaired a contract, it must then decide whether the impairment is substantial. In making this determination, courts consider several facts, such as whether the impairment eliminates an important contractual right, defeats an expectation of the parties, or creates a significant financial hardship for one party.

Here the Idaho Commission's policy of retroactively reaching back to the time Grand View created its LEO to take one half of its RECs and give them to Idaho Power without compensation meet all of the factors for a determination that the impairment is substantial. It eliminated the contractual right for Grand View to sell just the capacity and energy from its project to Idaho Power and nothing more. It defeated the expectation of Grand View that it owned and could market the RECs it creates by operating the project and it does create a significant financial hardship for Grand View as evidenced by Mr. Paul's affidavit quoted in the clarification order. Clearly the first step is satisfied by eliminating Grand View's contract right, defeating its legitimate expectations and creating a significant financial hardship.

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[20] *Id* at P 10.
[21] *Id*

The second step of the contract impairment test requires an analysis of whether the Commission's retro-active 'clarification' "serves 'an important public purpose,' and whether the act is 'reasonable and necessary' to advance that purpose."[22] No public purpose, let alone an "important" public purpose can be served by the Commission's order on 'clarification.' The order only affects one entity, Grand View Two. The forward looking policy order in the Commission's PURPA docket is not at issue. The clarification order is private in application, it serves no public purpose other than to punish a sole actor seeking to avail itself of its rights under PURPA. Because the Commission's decision serves no public purpose it is unnecessary to proceed to the third step in the analysis and examine whether it is "reasonable and necessary" to advance a public purpose.

IV.
GRAND VIEW HAS CONDUCTED ITSELF THROUGHOUT THESE PROCEEDINGS AS A LEGITIMATE COUNTER PARTY TO ITS LEO WITH IDAHO POWER

The Commission found that:

> Grand View's interconnection and site preparation activities are not directly relevant to the question of whether Grand View's alleged LEO was conditioned on Idaho Power disclaiming all REC ownership.[23]

Cleary, REC ownership did not need to be resolved in order for Grand View to create a legally enforceable obligation. FERC's ruling on this topic is instructive, and controlling:

> [T]he phrase legally enforceable obligation is broader than simply a contract between an electric utility and a QF and that the phrase is used to prevent an electric utility from avoiding its PURPA obligations by refusing to sign a contract, or as her from delaying the signing of a contract, so that a later and lower avoided cost is applicable. We further

[22] *Id.* at P 10.
[23] Order No. 32913 at p. 23.

> find that Idaho PUC's June 8 Order ignores the fact that a legally enforceable obligation may be incurred before the formal memorialization of a contract to writing.[24]

FERC further observed that:

> Courts have recognized that negotiations regarding terms that parties to the negotiations intend to become a finalized or written contract, may in some circumstances result in legally enforceable obligations on those parties notwithstanding the absence of a writing.[25]

By insisting on a term that it knew was objectionable to the QF, and that was not required by then existing law, Idaho Power was actively preventing the parties from executing the contract. But Idaho Power's delaying tactics did not prevent Grand View from proceeding with the project and Grand View did proceed in good faith reliance on this Commission's then existing regulatory landscape. Therefore the late stages of development (the project has actually commenced construction) and the mature interconnection process (the GIA is executed) all serve to prove Grand View's obligation to provide its electric output to Idaho Power.

IV.
CONCLUSION

Grand View respectfully requests that the Commission reconsider Order No. 32913 and expressly order Idaho Power to honor the legally enforceable obligation created between the parties in August 2011. Should the Commission so decide Grand View stands ready to participate in any additional proceedings on reconsideration including hearing and/or additional briefing/oral argument.

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[24] *Cedar Creek Wind, LLC,* 137 FERC ¶ 61,006 , at P 15 (2011).
[25] *Id.* at FN 62.

Respectfully submitted, this 18th day of November 2013.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of November 2013, I served a true and correct copy of Grand View PV Solar Two's Petition for Reconsideration upon the following by the method indicated.

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